United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

924

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23339

YI LAU AU, et al.
Petitioners

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

ON PETITION TO REVIEW DEPORTATION ORDER

of

BOARD OF IMMIGRATION APPEALS

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2. Whether an informant's "tip" that some Chinese persons he believed to be in this country illegally could be found at a specific place, without more, was information of sufficient specificity and particularity to furnish Immigration and Naturalization inspectors with probable cause to arrest petitioners for a violation of U.S. immigration laws.

3. Whether the facts of this case are such as to excuse the Immigration and Naturalization Service inspectors from failure to seek arrest warrants prior to taking petitioners into custody.

4. Whether the standard referred to by the words, "reason to believe" in the statute authorizing Immigration and Naturalization Service inspectors to make warrantless arrests is tantamount to the standard historically labelled, "probable cause".

5. Whether the BIA properly found that the testimony of the INS inspectors met the burden of proof required of the INS to show that the inspectors had received an informed and voluntary consent from the maitre d' to search the kitchen at Trader Vic's Restaurant for possible violators of U.S. immigration laws.

6. Whether evidence seized and obtained as a direct result of petitioners' being taken into custody by Immigration and Naturalization Service inspectors was properly admitted into evidence at petitioners' deportation hearing.

This case has not been previously before this Court except on a motion to consolidate with Tit Tit Wong, No. 23527, which motion was denied.

REFERENCE TO RULINGS

This is an appeal from a decision of the Board of Immigration Appeals entered on June 20, 1969, dismissing petitioners' appeals from deportation orders issued against them on January 13, 1969 by a Special Inquiry Officer for the Immigration and Naturalization Service.

STATEMENT OF THE CASE

On October 31, 1967, the Immigration and Naturalization Service received information by way of an informant's tip that some Chinese aliens, illegally in the United States, were working at Trader Vic's Restaurant. The informant's information did not give the aliens' names, nor did it describe them or reveal how many such aliens there were. Relying on the tip, eight or nine INS* investigators, including Inspectors Podrasky, Burns, Lamoreaux and Taylor, went to Trader Vic's Restaurant about 5:30 p.m. on October 31, 1967 (TR 18-20).

No attempt was made to secure a Warrant of Arrest, because according to Inspector Burns, such information as they possessed "many times is not clear enough and we make an inquiry as to who is employed and what their immigration status is." (TR 18)

Upon arriving at Trader Vic's (located in the Statler Hotel), several of the Inspectors stationed themselves in hotel corridors at entrances to the restaurant proper, while several others apparently were deployed near the door leading from the kitchen to outside the building. Inspectors Podrasky, Burns, and Taylor entered the restaurant itself and approached the reception desk, which was tended by Mr. Park, the Assistant Manager of Trader Vic's.

There is a conflict in the testimony as to what happened next. INS officials testified that they showed their badges to Mr. Park, who then

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* Throughout this brief, INS will refer to the Immigration and Naturalization Service; TR, to the transcript of the deportation hearing; R, to the reopened deportation hearing; and BIA, to the Board of Immigration Appeals decision. Any other documents will be described in full.

granted them permission to search the restaurant, including the kitchen. (TR 20-21, R48) Mr. Park, on the other hand, said that he recognized Mr. Podrasky but that no identification was presented to him and that after hurriedly alluding to their purpose, the INS officials started for the kitchen, having neither displayed any identification nor received his permission to enter there. (TR 42) Mr. Park said that he chased after Mr. Podrasky as the inspectors made their way through the restaurant and offered him a table to which he, Park, would bring any employees that Mr. Podrasky requested to see. (". . .[Inspector Podrasky] was going to the kitchen and I told him I was following him and I told him I was going to reserve a small corner of the restaurant so that whoever they wished to question, we would bring out." (TR 47)) Joseph DeLucian, the kitchen manager, similarly testified that he was not asked for, nor did he give, permission to the INS men to enter the kitchen. (TR 50) The hearing officer resolved the contradictory testimony in favor of the INS and the Board of Immigration Appeals upheld the finding. (BIA 8)

Whether with or without Mr. Park's consent, Inspectors Podrasky, Burns, and Taylor,after stopping briefly at the reception desk moved on through the restaurant toward the kitchen. As they walked, Inspector Burns observed a Chinese person in kitchen garb, running toward the front door of the restaurant. Burns ran after him, stopped him and asked the man to return to the kitchen with him. The man submitted to Burn's request. This was petitioner Yim Tsz Ki. (TR 21-23, R 4-5)

While returning Mr. Yim to the kitchen, Inspector Burns saw another Chinese person, also attired in kitchen clothes, heading for the front door. Burns stopped this man, who turned out to be petitioner Lam Sai Ting, and

all three --- Burns, Yim, and Lam proceeded toward the kitchen. (R 5, 8) On the way to the kitchen, Mr. Lam bolted from Inspector Burn's custody and started through a side-door of the restaurant. He was immediately grabbed by Inspector Lamoreaux, who was stationed in the hotel hallway for just such an eventuality. (R 23) Meanwhile, Inspectors Podrasky and Taylor had entered the kitchen and begun questioning Chinese employees. Two kitchen workers dropped the food that they were preparing and ran through a rear exit. Inspector Taylor ran after them. He managed to catch up with one of the men, grabbed him by the arm, and returned the man to the kitchen. This man was petitioner Au Yi Lau. (The other man was not caught.) In short, "[e]ach of the three [petitioners] was apprehended by an investigator from the Washington District Office, while they were [sic] attempting to run from the officers checking personnel in the restaurant." (pp. 2-3 of Decision of Special Inquiry Officer after Re-opened Hearing)

All three men were taken to the locker room for questioning. The record is unclear as to whether the INS inspectors searched petitioners' lockers or went through petitioners' pockets. In any event, the INS seized seamens documents from petitioners. (R 26) The petitioners were then transported in the custody of the INS inspectors to INS headquarters for further questioning through interpreters. The petitioners were fingerprinted and signed statements were taken from them. At petitioners' deportation hearing, the INS offered into evidence their seamens' documents, their fingerprints and their signed statements to show their identity and more important, their deportability. These items were accepted into evidence by the Special Inquiry Officer over the objection of petitioners' counsel, who contended that these items of evidence were the fruits of an

illegal arrest, and therefore, inadmissible as evidence against petitioners. (TR 9, 11-12, 14, 29-30, 38, 56) The Special Inquiry Officer found the three petitioners in the case deportable and the BIA affirmed his decision. Petitioners seek a reversal of the BIA decision.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution declares, in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

Section 287 of the Immigration and Nationality Act, 8 U.S.C. 1357, provides, in pertinent part:

> (a)
>
> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant -
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who is his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to

arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . .

ARGUMENT

I. Petitioners' arrests were based merely upon their Chinese extraction and their attempted egress from the restaurant and therefore were without probable cause and were illegal.

A. Although arrest warrants were not issued and served upon them until some two hours after they had been taken into custody, in point of time petitioners were placed under arrest when INS officers restrained them of their liberty at their place of employment, Trader Vic's Restaurant.

In Coleman v. U.S., 111 U.S. App. D.C. 210, 295 F. 2d 555 (1961), cert. den. 369 U.S. 813, this Court approved the definition of arrest given by the trial court in its instructions to the jury. The charge read, in pertinent part:

> You are instructed that an arrest is the restraint of the right of locomotion, or a restraint of the person. It may be made without force or without touching the body. It is sufficient if the party arrested is within the power of the officer and submits to arrest, even as a result of a verbal command . . . .
>
> You are instructed that in order for there to be an arrest it is not necessary that there be . . . a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence. (Emphasis supplied by Court of Appeals) 295 F. 2d, at 563.

The Supreme Court has had occasion to use the same rationale: "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." Henry v. U.S., 361 U.S. 98, 103 (1959).

In Kelley v. U.S., 111 U.S. App. D.C. 396, 298 F. 2d. 310 (1961), a known felon was asked to step outside a restaurant and after questioning

by police officers, was charged with possession of marijuana. In holding that there was no probable cause for the arrest, the Court considered the time of the arrest.

> Whether or not the police deemed the appellant under arrest when he was accosted at the counter, he would have been rash indeed to suppose he was not under arrest by the time he got outside the business establishment. 298 F. 2d., at 312.

The BIA held that there were no arrests until after the INS inspectors had determined, apparently after questioning and searching petitioners in the locker room, that petitioners were in this country illegally. (BIA 11).

The ruling seems plainly in conflict with the decisions of this court in Coleman and Kelley. Petitioners submit that they were under arrest at that point in time when officers of the INS first restricted their movement. For Mr. Yim and Mr. Lam, this was when Inspector Burns apprehended them in the restaurant proper. For Mr. Au, it was when Inspector Taylor grabbed him after his unsuccessful flight from the kitchen. Petitioners had no choice but to accompany the INS Inspectors, as Mr. Lam found out when he bolted from Inspector Burns' custody only to be intercepted by Inspector Lamoreaux.

Petitioners emphasize the question of the time of their arrests because all evidence or admissions obtained subsequent to their official detention is tainted as the fruit of an illegal arrest. "The validity of the search thus turns upon the narrow question of when the arrest occurred . . . ." Rios v. U.S., 364 U.S. 253, 262 (1960).

B. Turning to the substantive question of the arrests themselves, petitioners urge that their arrests were clearly without probable cause,

and therefore were illegal.

> Since Marshall's time . . . [probable cause] has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man or reasonable caution in the belief that' an offense has been or is being committed. Brinegar v. U.S., 338 U.S. 160, 175-176 (1949), quoting Carroll v. U.S., 267 U.S. 132, 162 (1925).

> "The police may not arrest upon mere suspicion but only on 'probable cause.'" Mallory v. U.S., 354 U.S. 449, 454 (1957).

The Supreme Court, in Wong Sun v. U.S., 371 U.S. 471 (1963), referring to the standards to be used by officers making warrantless arrests, observed:

> Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed. 371 U.S., at 479-480.

Following this holding for these facts to give rise to probable cause, they must be scrutinized as if they were being proffered to a magistrate in support of a request for an arrest warrant.

When INS officials made the arrests in Trader Vic's Restaurant, they were, according to their own testimony, in possession of the following facts:

(1) an informant's tip that Chinese aliens illegally in the United States were working at Trader Vic's (Mr. Burns testified that he did not have any information regarding the names, physical characteristics, or the number of "illegal aliens" that could be found at Trader Vic's. (TR 18);

(2) their own observation that petitioners were members of the Mongolian race and were rapidly leaving Trader Vic's.

But the mere fact that information has been received from an informer is not enough to justify an arrest. It is the informer's information which then must meet the standard of probable cause.

Thus in McCray v. Illinois, 386 U.S. 300 (1967) probable cause was held to have been shown where the informer provided precise information as to the identity of the defendant and his appearance, the defendant's possession of narcotics, and the fact that he sold them at a particular location. 386 U.S., at 302-303. Furthermore, the informer accompanied the police in order to identify him. 386 U.S., at 302.

Mindful of the dangers inherent in a system of law enforcement that relies heavily on the faceless informer, the Supreme Court has over the years demanded that "tips" meet standards of particularity and credibility. Aguilar v. Texas, 378 U.S. 108 (1964); Draper v. U.S., 358 U.S. 307 (1959).

> We have held that identification of the suspect by a reliable informant may constitute probable cause for arrest where the information given is sufficiently accurate to lead the officers directly to the suspect. That rule does not, however, fit this case . . . . Not the slightest intimation appears on the record . . . to suggest that the agents . . . had consulted some . . . kind of official record or list, or had some information of some kind which had narrowed the scope of their search to this particular [person]. Wong Sun v. U.S., 371 U.S. 471, 480-481.

When the INS inspectors entered Trader Vic's, they had absolutely no information to lead them to believe that Mr. Au, Mr. Yim and Mr. Lam were present. (Indeed, Inspector Burns testified that such information as the INS men possessed "many times is not clear enough . . ." (TR 18)) Reliance by law enforcement officials on vague and general information such as the INS agents here possessed was criticized in Beck v. Ohio, 379 U.S. 89 (1964),

where "the officer testified to nothing that would indicate that any informer had said that petitioner could be found at that time and place." 379 U.S., at 94.

And surely probable cause for their arrest cannot be based on the fact that they appear to be of Chinese extraction. But this appears to be one rationale of the decision of the Board of Immigration Appeals. (BIA 10-11). Apparently relying on the assumption that Chinese crewmen illegally in the United States often find work in restaurants serving an Asian cuisine, the Board stated: "A suspicion can be a reasonable one if no: more appears than that the person approached is in an area in which illegal aliens are found." (BIA 9) (It should be noted, that while INS officers had made investigations at Trader Vic's previous to petitioners' arrests, (BIA 2) the record indicates that the only other arrests of illegal aliens at Trader Vic's occurred subsequent to the arrests here. (BIA 6).)

For support of its proposition, the Board relies principally on U.S. v. Montez-Hernandez, 291 F. Supp. 712 (E.D. Cal. 1968) (BIA 9) which ruled:

> When stopped for questioning, if a non-English-speaking Mexican farm worker refuses to produce identification, there is probable cause for arrest and any incident search would be legal. (at 715),
>
> and
>
> It cannot be considered an arbitrary invasion of privacy merely to ask for proper identification in an area known to contain large numbers of illegal Mexican aliens, particularly when the person being questioned gives the appearance of being nervous and being of Mexican ancestry. (at 716)

The rationale of Montez-Hernandez and of the BIA decision, which relies upon it, is clearly contrary to the teaching of Rios v. U.S., 364 U.S. 253 (1960). There policemen sought to show probable cause by pointing to

the geographical area in which the arrest was made. Mr. Justice Stewart described the scene of the arrest:

> The neighborhood had a reputation for 'narcotics activity.' The officers saw the petitioner look up and down the street, walk across the lot, and get into the cab. Neither officer had ever before seen the petitioner, and neither of them had any idea of his identity. Except for the reputation of the neighborhood, neither officer had received information of any kind to suggest that someone might be engaged in criminal activity at that time and place. (364 U.S., at 256)

The Supreme Court concluded that "upon no possible view of the circumstances" could probable cause be shown. (364 U.S., at 261)

The record, of course, nowhere indicates that Trader Vic's had a "reputation" as a haven for illegal Chinese aliens. But even if so, McCray and Rios, read together, prohibit arrests of persons without information more specific that their race places them in a generic group regarded by law enforcement officials as one whose members may be illegally present in the United States or that they may be found in a location that is frequently a harboring place for illegal aliens.

Such also is the recent holding of the Supreme Court in Sibron v. N.Y., 392 U.S. 40 (1968). The arresting officer observed Sibron over a period of eight hours talking to known narcotics addicts. The officer finally accosted Sibron, searched for and found narcotics and placed him under arrest. The Court held:

> The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. 392 U.S., at 62.

Thus, in the instant matter, the fact that illegal Chinese aliens might frequently find work in restaurants does not give rise to the "reasonable

inference" that the persons of Chinese extraction employed in Trader Vic's Restaurant on the evening of October 31, 1967, were in the country illegally. The record at one point indicates that the INS inspectors had specific information as to one Chinese alien who had entered the country illegally (R 52), but the record clearly discloses that the conduct of the INS agents, relying on the tip about "illegal Chinese," was directed at petitioners as suspected law violators and not as sources of information to assist the inspectors in an investigation of another person. ("Courts have never countenanced arrest by association . . .," Hinton v. U.S., U.S. App. D.C, No. 22068 (Oct. 14, 1969))

This dazzling inferential leap, from the bald fact of Chinese extraction to the conclusion of law-violator, is the type of logic condemned in Henry v. U.S., 361 U.S. 98 (1959), a case involving theft from interstate commerce.

> The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband.
> 361 U.S., at 104.

C. Nor may the INS point to the flight of petitioners to remedy the defects in the "tip" that led them to the restaurant. Petitioners' individual attempts to leave the restaurant cannot be used to prove that petitioners knew that the plainclothes inspectors of the INS had come to arrest them. Aberty v. U.S., 162 U.S. 499, 511 (1896). Their attempts to leave, however rapid they might have been, were "ambiguous" acts. Wong Sun v. U.S., 371 U.S. 471, 481-482 (1963); Miller v. U.S., 375 U.S. 301, 311 (1958).

The practice whereby arresting officers first create a chaotic or confusing situation which precipitates ambiguous conduct on the part of an ostensibly law-abiding person and then point to the conduct to justify an

arrest has been discussed and condemned by the Supreme Court.

> [to permit such conduct] . . . would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked. Wong Sun v. U.S., 371 U.S. 471, 484 (1963) (Emphasis supplied)

While the Supreme Court has recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest," Terry v. Ohio, 392 U.S. 1, 22 (1968), this holding does not envision detention based merely on race and locale. There must be some specific, non-ambiguous conduct from which imminent or past criminal behavior may be inferred, such as the "casing" of a store as in Terry.

The BIA cites the concurring opinion of Mr. Justice White in Terry (BIA 9), apparently in support of the proposition that INS inspectors could enter Trader Vic's Restaurant and question whomever they please. (The BIA believes, it should be noted, that the INS inspectors' power to interrogate is "even broader than that possessed generally by law enforcement officers." (BIA 9) But Mr. Justice White, while stating that police officers could address questions to anyone on the street, observed that "[a]bsent special circumstances, the person may not be detained or frisked but may refuse to cooperate and go on his way." (Emphasis supplied) 392 U.S., at 34, a right which the BIA has not recognized here. And see Sibron v. New York, 392 U.S. 40 (1968), which clearly limits the Terry holding to situations where an investigating officer has reason to fear for his safety, 392 U.S. at 27, a situation clearly inapplicable when the petitioners were arrested.

The situations in which INS inspectors may interfere with a person's liberty of movement on less than probable cause are narrowly circumscribed.

Thus the cases which permit a totally arbitrary inquiry regarding identification arise at border check points where the function of INS is to prevent entry of illegal aliens into the United States. See Jones v. U.S., 326 F. 2d. 124 (9th Cir. 1963); Ramirez v. U.S., 263 F. 2d. 385 (5th Cir. 1959); U.S. v. Hortze, 179 F. Supp. 913 (S.D. Cal. 1959).

Petitioners can find no authority that permits INS officers to make arrests on less than probable cause once a person has entered the United States and taken his place among the general population.

In a landmark case regarding the transportation of contraband, the Supreme Court had occasion to distinguish the two situations:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary, because of national self-protection reasonably requiring one entering the country, to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Carroll v. U.S., 267 U.S. 132, 154-155 (1925)

The burden therefore rests with the INS to make a prima facie case for the deportation of an individual before it may arrest him, cf. U.S. v. Abel, 326 U.S. 217 (1960), not afterwards.

II. Petitioners' arrests, illegal from their inception, cannot be legitimized by the fingerprints, admissions or any other evidence seized from petitioners during their illegal detention, nor may such "fruits" of an illegal arrest and search be admitted into evidence at a deportation hearing, however probative of a violation of the Immigration Laws such

evidence might be.

It has long been held that illegal arrests and searches cannot be made legal by what they uncover. U.S. v. DiRe, 332 U.S. 581 (1948); Byars v. U.S. 273 U.S. 28 (1927).

Petitioners' fingerprints were taken while they were in custody of the INS officials and were used to identify petitioners. (TR 12) This Court has held as inadmissible fingerprints secured during an illegal detention, and at the same time noted "the salutary effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused." Bynum v. U.S., 104 App. D.C. 368, 262 F. 2d. 465, 467 (1958).

Any admissions petitioners made to INS officials during their illegal detention and any documents taken from them are, of course, tainted as the "fruits" of an unwarranted intrusion under the doctrine of Wong Sun v. U.S., 371 U.S. 471, 485-486 (1963), and should not have been admitted into evidence at petitioners' deportation hearing.

III. The history leading to the Fourth Amendment, as well as subsequent emending Supreme Court Decisions, make it clear that the conduct of INS officers in this case was tantamount to an intrusion with a general warrant, and therefore, clearly unconstitutional.

> [The] words [of the Fourth Amendment] are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Stanford v. Texas, 379 U.S. 476, 481 (1965).

As it does not specify the person to be seized, or describe the object to be found, or place a time limit on the government officials

searching power, the general warrant grants virtually total discretion to law enforcement officials. The general warrant is constitutionally a nullity.

The judges in the landmark cases of Entick v. Carrington, 19 How. 1029, and Wilkes v. Wood, 19 How. 1153, (the former termed by Mr. Justice Bradley, "one of the landmarks of English liberty," Boyd v. U.S., 116 U.S. 616, at 626 (1885)) did not conceal their distaste for such a practice when they awarded damages in a trespass action brought against the king's officials. Agents of the king were sent on different occasions to arrest persons and gather evidence in a case of seditious libel. On one occasion, the name of the person sought was not included on the warrant; another time the papers to be seized were not described with particularity. (Both Entick v. Carrington and Wilkes v. Wood arose out of this same "manhunt.")

> The defendants claimed a right, under precedents, to force persons' houses, break open escrutores, seize their papers, etc., upon a general warrant, where no inventory is made of the things taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject. (19 How., at 1167)
>
> . . . and if suspicion at large should be a ground of search, especially in the case of libels, whose house would be safe? (19 How. at 1073)

These oft-cited cases remain law today. See, e.g., Stanford v. Texas, 379 U.S. 476, 486.

In pre-Revolutionary Massachusetts, James Otis inveighed against the writs of assistance, a specie of the general warrant that allowed the crown's customs officials to roam at will in search of contraband.

> It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book. Otis' Speech to the Court in the Writs of Assistance case, quoted in II Minot. Continuation of The History of The Province of Massachusetts Bay, 92 (1803)

But in Otis' time there was little precedent indeed for the general warrant.

> Diligent research has been made by Otis and Thatcher, and by Girdley, aided, as may well be supposed, by the officers of the customs, and by all the conspirators against American liberty, on both sides of the water, for precedents and examples of any kind similar to this writ of assistance, even in England. But nothing could be found except the following: An act of the 12th of Charles 2d. Chapter 22. An act for regulating the trade of Bay-making, in the Dutch Bay fall, in Colchester. John Adams, Novanglus and Massachusettensis, 271

Historians and contemporary observers record, and our jurisprudence operates from the fact, that the notorious writs of assistance were one cause of the American Revolution, and that the Fourth Amendment was in large part written to prevent any recurrence of the general warrant. See, e.g., Marcus v. Search Warrant, 367 U.S. 717, 728-729 (1961).

INS officials acted here without even a spurious warrant. Nonetheless, they claim authority to roam about at will and stop and arrest whomever they please, leaving a blank arrest warrant at the INS headquarters so that the name of their suspect may be filled in after they extract it from him. If INS is correct, its agents may stop anyone of Chinese extraction, whether a citizen, a permanent resident alien, diplomat, or whatever, on the grounds that "illegal Chinese" are in the area. (One may wonder what it is about an "illegal Chinese" that distinguishes him in appearance from a "legal Chinese.") And once it appears that the arbitrarily questioned Chinese person is not in

this country legally, the INS then may put his name on an arrest warrant. This type of conduct, so far as petitioners can find, is not tolerated in other areas of law enforcement.

See, for example, Lankford v. Gelston, 364 F. 2d. 197 (4th Cir. 1966) in which the Fourth Circuit Court of Appeals condemned the Baltimore police for intruding upon Negro families in Baltimore, Maryland, while searching for two robbery-murder suspects of that race, and granted an injunction against such practice.

Petitioners' alienage, of course, does not exclude them from the protections guaranteed by the Fourth Amendment. Yick Wo v. Hopkins, 118 U.S. 356 (1885).

Petitioners suggest it is noteworthy that INS officials did not seek a warrant, although they had ample time to do so. This fact alone might well vitiate the INS claim that the arrests and seizures of evidence here were legal.

The INS points to the Immigration and Naturalization Act, Section 287(a)(2), 8 U.S.C. 1357(a)(2), for their authority to arrest an alien without a warrant. To make such an arrest, not only must the Inspector have "reason to believe that the alien so arrested is in the United States in violation of [a] law" 8 USC 1357(a)(2), "but this authority is conditioned, at a minimum, upon a reasonable determination that the alien is likely to escape before an arrest warrant can be obtained . . ." U.S. v. Mason, 344 F. 2d. 673, 680 (2nd Cir. 1965), construing 8 USC 1357(a)(2).

> . . . the practice of arresting without a warrant when it is practicable to obtain one is not to be encouraged. On the contrary. In a doubtful or

> marginal case of probable cause an arrest may be sustainable on a warrant where without one it would fall. Ford v. U.S., 122 U.S. App. D.C. 259, 352 F. 2d. 927, 933 (1965) en banc

And the Supreme Court has declared:

> It is to be remembered that an INS Officer may not arrest and search on his own. Application for a warrant must be made to an independent responsible Officer, the District Director of the INS, to whom a prima facie case of deportability must be shown. Abel v. U.S.,326 U.S. 217, 236-237 (1960)

See also, U.S. v. Coplon, 185 F. 2d. 629 (2nd Cir., 1950).

Whatever the circumstances may be under statute or at the common law for a warrantless arrest, they are not present here. 8 USC 1357(a)(2) is not carte blanche authority for a warrantless arrest. Administrative officials do not operate in the areas of individual liberty and privacy free from restraint. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967).

Nor may consent to a warrantless search be lightly inferred. It was error for the Special Inquiry Officer to resolve the conflicting testimony regarding consent to search the kitchen in favor of the INS, and it was error for the BIA to sustain this finding. (BIA 7-8). The contradicted testimony of the INS inspectors, without other evidence, does not meet the high standard required when the alleged waiver of a fundamental right is at issue.

Fourth Amendment rights are fundamental and personal. Their waiver may not be presumed. Johnson v. Zerbst, 304 U.S. 458 (1938). This is equally true, if not more so, where the government seeks to justify a warrantless search by pointing to the consent of a third party. Stoner v. California, 376 U.S. 483 (1964). Petitioners submit that the INS failed to show that its search met the standard enunciated almost twenty years ago by this Court

in Judd v. United States, 89 U.S. App. D.C. 64 190 F. 2d. 649 (1951):

> Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. 190 F. 2d., at 650-651.

The Court cited with approval a case holding that improper pressure had been used where a police officer displayed a badge and declared he had come to search a dwelling. 190 F. 2d, at 651, citing U.S. v. Slusser, 270 F. 818 (S.D. Ohio, 1921).

Such acquiescence to a claim of lawful authority, as opposed to an intelligent waiver of a known right, cannot be used to show consent. Johnson v. U.S., 333 U.S. 10 (1948); Higgins v. U.S., 93 U.S. App. D.C. 340, 209 F. 2d. 819 (1954).

The inspectors may well have the same right as the general public to enter a restaurant. (This, of course, does not mean that they may make arbitrary arrests of persons in the public part of the restaurant, or any other place, as was discussed supra.) But the law is clear that the INS Officers could not enter the kitchen without a clear and informed consent on the part of Mr. Park. Mr. Park testified that he gave no such permission, and nothing in the record indicates that the INS Officers informed Mr. Park of his right to refuse to consent to warrantless search. See U.S. v. Blacock, 225 F. Supp. 268 (E.D. Pa., 1966). Nor is there any other evidence in the record which would permit a finding that Mr. Park gave an informed and voluntary consent to a search of the kitchen.

The Supreme Court, in a recent decision involving the consent of a third party, had occasion to discuss where the burden of proof fell in such situations:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. (Emphasis supplied) Bumper v. North Carolina, 391 U.S. 543 (1968)

Petitioner Au, who was arrested when he attempted to leave the kitchen, urges that the INS did not meet its burden of proof and that as the record is devoid of any evidence indicating that Mr. Park intelligently and voluntarily, consented to a search of the kitchen, save the self-serving testimony of INS inspectors, the Special Inquiry Officer improperly resolved the conflicting testimony in favor of the INS and the BIA improperly sustained his finding.

CONCLUSION

For the reasons set forth above, the decision of the Board of Immigration Appeals should be reversed and petitioners' deportation orders should be set aside.

Respectfully submitted,

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December 22, 1969

*Counsel acknowledges the substantial legal research and draftsmanship of Stephen J Fortunato, Jr., third year law student at George Washington University Law School.

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

Files: A15 759 505
A15 759 506
A15 759 507 - Washington, D.C.

JUN 2 0 1969

In re: AU YI LAU
YIM TOZ KI
LAM SAI TING

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: March 13, 1969
On behalf of respondents: David Carliner, Esquire
502 Warner Building,
Washington, D.C. 20004

On behalf of INS Service: Irving A. Appleman
Appellate Trial Attorney

CHARGES:

Order: (Au) Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - In United States in violation of law, entered after being refused permission to land as crewman

(Yim and Lam) Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - Crewman, remained longer

Lodged: None

APPLICATION: Termination of proceedings

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The special inquiry officer entered the respondents deported on the charge which relates to each. They appeal on the ground that the evidence to establish deportability was obtained after an illegal arrest and search. The appeals will be dismissed.

The claim that there was an illegal arrest and search requires a presentation of the facts in detail. Except for one matter there is little conflict as to the facts.

Service investigators, believing that one or more Chinese aliens illegally in the United States were employed in a restaurant located in a hotel building, decided to enter the restaurant to question the employees as to whether they were aliens illegally in the United States. They had gone to the same restaurant for the same purpose on two or three occasions in the past year. They did not have a warrant of arrest. 1/

About 5:30 p.m. on October 31, 1967, eight or nine Service investigators went to the hotel building. They were Burns, Pokorny, Taylor, Lamoreaux, Kelley, Stephanelis, Smith and one or two more (p. 2-10). With the permission of the hotel employee stationed there, Kelley and Lamoreaux entered the hotel by a side or rear door. Kelley remained near the door. He had a view of some hallways. He would have stopped anyone who tried to

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1/ The District Director has discretionary authority to issue an administrative warrant for the arrest of an alien, if he determines that the arrest is necessary or desirable. 8 C.F.R. 242.2(a). Ordinarily, the District Director does not issue a warrant of arrest until after the alien has been questioned and it is determined that a prima facie case of deportability exists.

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leave hurriedly. Lawrence, traveling through the hallways of the hotel, made his way to a restaurant room which had a door on a hallway. The door was open, Lawrence stationed himself in the hallway so that he could see into the room (pp. R-19, R-21, R-60, R-62). Burns, Podrasky and Taylor entered the restaurant by the front door. The disposition of the other investigators is not shown. The three who entered by the front door approached Park, the assistant manager, who was in charge. Burns and Podrasky identified themselves and carried on the conversation. Taylor took no part of the conversation (pp. 20-21, R-4). They were interrupted briefly when Park received a phone call. There is a conflict in the evidence as to what happened next. Park testified that Podrasky identified himself but did not ask for permission to go to the kitchen; that while he was on the phone, Podrasky said that he was from the Immigration Service and he had to go into the restaurant and question the employees; that Podrasky went on without waiting for permission; that as soon as he had hung up the phone, he denied after Podrasky and offered to set up a small table in the dining room, to which he would send the employees whom Podrasky wanted to see; that Podrasky did not answer, but asked for the direction of the kitchen; that he pointed out the direction; and that he did not tell Podrasky he could not go into the kitchen (pp. 39-43, 47-49). The investigators, on the other hand, testified that after Park hung up, they told him that they wished to talk to the employees, and that Park gave permission to go to the kitchen to talk to the employees (pp. 20-21, 31, R-2-R-4, R-47, R-70, R-72-R-73, R-75). Podrasky testified he could not recall Park offering to bring the kitchen employees to the dining room so that he could talk to them.

In any event, on the way to the kitchen, Burns, stopped to talk to an employee. He saw a Chinese person, garbed in a kitchen worker outfit, running toward the front door.

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He ran after, stopped him at the door, identified himself, and invited him to come to the kitchen to talk. This person is respondent, Yin Tse Ki (pp. 21-23, R-4-R-5). As Burns and Yin were going to the kitchen, a second Chinese person, dressed like the first, headed for the front door. Burns stopped him and also invited him to come to the kitchen. This person is respondent, Lam Sui Ting (pp. R-5, R-6). On the way to the kitchen, Burns and the two employees passed a room being remodeled to provide additional dining space. A door of this room led to the hallway of the hotel. Lamoreaux was standing in the hallway at the door. Lam ran for the door. Burns followed. Lamoreaux intercepted Lam. He found Lam could speak no English, but did learn that he was off a ship. He apparently determined at this time to take Lam into custody. All went to the kitchen room. There, Lam again admitted to Lamoreaux that he had jumped ship. Yin admitted to Burns that he had jumped ship. Burns considered the admission a sufficient basis for detaining Yin. (pp. 22-24, 26, R-7-R-9, R-14-R-16, R-26-R-27).

Taylor and Pokrusky had gone on to the kitchen. They questioned employees there. Taylor noticed that an employee walked to the rear of the kitchen, where a door led to the hallway of the hotel. The employee spoke to two Chinese employees who were preparing food for their own consumption. They dropped their food and ran out through the rear exit. No inspector was stationed there. Taylor ran after them. They went in different directions. One was out of sight; he was not apprehended. Taylor caught up with the other, stopped him by taking his arm, and asked him to return to the kitchen. He did not hold him as they walked back. The chase took him past Kelley, standing off the hallway in which the chase took place. Kelley took no part in the chase. The third

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person is respondent, Au Yi Lam. In the kitchen, with the help of an employee, Taylor learned that Au had come off a ship and had something in the locker room which might help to identify him. He walked Au to the locker room and left him with Burns and Lamoreaux, telling them that Au appeared to be a crewman, that he had tried to run, and that he might have something in the locker. Taylor returned to the kitchen to continue questioning the other employees (pp. R-70-R-76, R-77-R-79, R-81-R-82).

Delurian, the kitchen supervisor, testified that when the investigators entered, he turned his back on them thinking they were part of the management staff, that suddenly he saw employees taken out to the locker room through the rear exit, that the investigator had come through the rear door, and that he had not been approached for permission to question the employees. He testified that he made himself understood to the respondents in broken English. Park had testified that respondents could speak no English: he made himself understood by writing Chinese characters.

The one illegal alien, known by name, who the Service thought was working in the restaurant, was not found and is still the object of search (pp. R-51-R-52).

The investigators took the three respondents to the office of the Immigration Service. There, friends came to visit them (pp. 27, R-10). Fingerprints were taken (p. 12). Translators were obtained and statements taken: Kelley took Yim's (Ex. 2), Lamoreaux took Lee's (Ex. 3), Burns took Au's (Ex. 4) (pp. 16-17, 25-27, R-10, R-27-R-29, R-32-R-44, R-52-R-56, R-58-R-59, R-63-R-66). At the Service office, warrants of arrest were issued and served about two hours after the aliens were located (p. 14).

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An investigation at the same place subsequent to the one in question, resulted in the apprehension of other aliens illegally in the United States (p. R-67).

Deportation hearings were started on November 1, 1967. At the hearings, which were consolidated, the respondents remained mute. The Service introduced the statements made by the respondents. The investigators who took the statements and an interpreter testified as to the taking of the statements and as to their belief that they represented what the aliens had stated. As to each alien, the Service introduced a seaman identity book and a seaman discharge book (Yin, Ex. 2-1; Lam, Ex. 2-3; An, Ex. 2-2); and seaman landing certificates (Yin, Ex. 4; Lam, Ex. 3; An, Ex. 2). A certificate of vaccination was also introduced for Yin. The respective identity and discharge books contain photographs which the special inquiry officer found to be good likenesses of the respondents. Counsel does not believe the likenesses exist (pp. R-6-R-7, R-11, R-30).

If the evidence presented by the Service is competent, it establishes the respondents are deportable aliens. See Shing Hung Ipai v. INS, 389 F.2d 994 (7 Cir. 1968). The statements of the respondents alone establish that they are aliens illegally in the United States. 2/ Apart

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2/ The statements reveal the following: Yin, a 23-year-old native of China, admitted as a crewman on June 21, 1962, (a typographical error: 1967 was obviously meant) deserted the ship at Baltimore on July 7, 1967. Lam, a 42-year-old native and citizen of China, admitted as a crewman about July 12, 1967, deserted his ship about July 13, 1967. An, a 43-year-old native and citizen of China, after being refused permission as a crewman, deserted his ship on July 12, 1967. He

(cont'd)

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from the statements, the issuing certificates establish alienage and the illegality of stay. The sworn's books establish identity of the respondents. There must also be considered the presumption that the alien in deportation proceedings, who has failed to show the manner of his entry, is in the United States in violation of law. Ah Chin Jung v. INS, 368 F.2d 637 (3 Cir. 1966) cert. denied 386 U.S. 1037.

Counsel contends the evidence presented by the Service cannot be used because it was illegally obtained since Park's testimony reveals that the investigators were not given permission to enter the premises to conduct a "search" and since the Service had no right to approach at least the alien in the kitchen. He contends the testimony of Park should be credited rather than the testimony of the investigators because Park is a disinterested witness, but it is in the interests of the investigators to show they were performing their duties. He also contends the Service must establish that permission was granted by evidence that is clear, convincing and unequivocal. The appellate trial attorney emphasizes that Park's own testimony reveals both that he consented

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have carefully examined the record as to the manner of taking of the statements. We find the statements were made by respondents with full knowledge of their constitutional rights to remain silent and to consult with attorneys, that there was no element of duress, and that the interpretation was properly made. Each of the aliens certified that the statements are incorrect in any material matter.

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to the investigators talking to the employees and that he did not deny the investigators the right to go to the kitchen. The appellate trial attorney also relies upon the corroboration found in the testimony of the Service investigators.

It is undisputed that the investigators had permission to be in the restaurant. The only issue is whether they had permission to go to the kitchen. We believe the Service has established that Park gave the investigators permission to speak to employees of the restaurant at their jobs and that he made no exception as to the employees who were in the kitchen. The investigators who were with Park are of the belief that he granted them permission to question the employees in the kitchen. Podrasky testified that he could recall no effort to bring the aliens out of the kitchen; and that he was invited into the kitchen (p. R-51). Taylor was of the belief that Podrasky had received permission to go to the kitchen (p. R-75). Burns testified that Podrasky asked Park for permission to speak to the employees and that in response, Park led the way to the kitchen (pp. R-3-R-5). The special inquiry officer, who observed the witnesses testify, resolved the conflict in favor of the Service. We see no reason on this record for reversing his finding.

Moreover, no respondent was apprehended in the kitchen. Two respondents, Yim and Lam, were apprehended in the restaurant - no issue is raised about Park granting the Service permission to talk to the employees there. An was apprehended in the public hallway of the hotel where permission to enter, if it was needed, was obtained when the hotel employee stationed at the door permitted the Service investigators to enter with knowledge of their employment. (See People v. [redacted], 18 N.Y.2d 238, 273 N.Y.S.2d 217, 219 N.E.2d 595, hallway in apartment house a public place.)

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While we have considered the question of permission — and we believe that Service employees should ask for permission as a matter of practice — the fact is that law enforcement officers are not required to obtain permission to enter a public place, like a restaurant, to question people there. Amaya v. United States, 247 F.2d 947 (9 Cir. 1957) cert. denied 355 U.S. 916. See Terry v. Ohio, 392 U.S. 1, 34 (White, J., concurring); Green v. United States, 259 F.2d 188 (D.C. Cir. 1958) cert. denied 359 U.S. 917 (1959). Furthermore, the power of an immigration employee to question appears to be even broader than that possessed generally by law enforcement officers. Section 287(a)(1) of the Act (8 U.S.C. 1357(a)(1)) provides as follows:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant —
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

Under this statute, it would appear no independent evidence of alienage is needed to approach a person. If independent evidence is needed, it can be found in the reasonable suspicion that a person is an alien. A suspicion can be a reasonable one if no more appears than that the person approached is in an area in which illegal aliens are found. United States v. Montes-Hernandez, 291 F. Supp. 712, 714-15 (S.D. Cal. 1968). See Abel v. United States, 362 U.S. 217 (1960); Lam Seng Hing v. INS, No. 21,784 (D.C. Cir. February 17, 1969), petition for certiorari pending, No. 1220, October Term, 1968; Amaya v. United States, supra; Matter of Wong and Chan, Interim Decision 1961 (BIA 1968); Matter of Pan, Interim Decision 1911 (BIA 1968); Matter of Chan, Interim Decision 1833 (BIA 1968).

Considering the facts of the instant case in light of the precedents we hold that it was proper to question the respondents and it was proper to arrest them. Evidence, if

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any, obtained as the result of the arrest was incident to a lawful arrest and was therefore competent. 1/ We shall develop these matters further.

It was proper to question respondents. The posting of the Service investigators did not constitute an arrest. Yin Sang Kwai, supra. The experienced Service investigators had reason to believe that illegal aliens were employed in a restaurant. They entered it to question the employees. They limited their questioning to whether the person was an alien and, if so, whether he was legally in the United States. These were matters within their authority. They did not enter to secure evidence for criminal prosecution. No force was used to enter. No force was used to question the employees. There was no harassment of employee or of management. Interference with business was so limited that the station supervisor thought, at first, that the investigators were part of the management. There was no search of any employee except those who attempted to flee. When the investigators were present, obviously of foreign

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1/ Whether any evidence was obtained from the respondents at the time of the arrest at the restaurant is not clear (See p. 3-27). If anything was obtained, it is not shown that it was not voluntarily produced. No respondent has alleged that anything was taken from him. Statements made by respondents after they were arrested could be used at the deportation hearing. Yiu Sang Kwai, supra. Documents which the respondents apparently left on their ships and which came into the possession of the Service in some unidentified manner and immigration certificates taken from the Service files were properly introduced.

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document, moving to make it impossible for them to be questioned, the investigators acted reasonably in taking steps to detain them for questioning as to their immigration status. 4/

The respondents were properly arrested. When the investigators determined that the respondents were aliens illegally in the United States, it was reasonable to arrest them without a warrant for, clearly, they were aliens who were likely to escape before a warrant could be obtained. Section 287(a)(2), 8 U.S.C. 1354(a)(2); Yam Sang Kwai, supra (concurring opinion).

Since it was reasonable to arrest the respondents, evidence obtained as the result of the arrest, if any was obtained, was incident to a lawful arrest and was therefore competent.

Katz v. United States, 389 U.S. 347 (1967); Wolf v. Colorado, 338 U.S. 25 (1949) (overruled, Mapp v. Ohio, 367 U.S. 643 (1961)); Gomez v. Layton, 394 F.2d 764 (D.C. Cir. 1968) cited by counsel are inapposite. Katz concerns eavesdropping by electronic means. It did not

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4/ Counsel contends that Burns had no cause to arrest Au merely because Au was progressing toward the front exit and was in an employee's uniform. Counsel believes that it was error to stop Au because if he were attempting to flee, he could have been apprehended by investigators who, counsel alleges, were stationed outside the building. Burns did not arrest Au for running away. He stopped him for questioning. He was authorized to do this. He did not arrest Au until he found that Au was illegally in the United States.

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involve the right to question a person. Wolf concerns evidence admittedly seized illegally. We find no illegality in the obtaining of evidence here. Gomez merely held that one claiming an unconstitutional deprivation of liberty of movement was entitled to a judicial hearing on his claim.

ORDER: The appeals are dismissed.

Chairman

BRIEF FOR RESPONDENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23339

YI LAU AU, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

On Petition to Review Deportation Order of
Board of Immigration Appeals

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
Assistant United States Attorney.

Of Counsel:

CHARLES GORDON,
General Counsel,
Immigration and Naturalization Service

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED FOR REVIEW *

The sole issue presented by this petition is whether a deportation order, supported by evidence which clearly and unequivocally establishes that petitioners are aliens who are unlawfully in the United States and are thus subject to deportation, is invalidated by its reliance on evidence resulting from allegedly unlawful arrests.

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23339

YI LAU AU, ET AL., PETITIONERS

v.

U. S. IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

On Petition to Review Deportation Order of Board of Immigration Appeals

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Each of the petitioners was charged in deportation proceedings with having come to the United States in 1967 as alien crewmen and having remained in this country thereafter in violation of law. R. 264, 260, 252.[1] In the ensuing deportation proceedings the petitioners were represented by counsel who represents them here, and by stipulation of counsel the three proceedings were consoli-

[1] R. references designate the certified administrative record, filed by respondent as required by law, and paginated by it for the convenience of the court.

dated, since they involved a common factual issue. R. 210. Upon advice of counsel each of petitioners remained mute in the deportation proceedings, declining even to identify himself. R. 215, 241, 243. In the deportation proceedings, as in this court, petitioners resisted the deportation charge solely by contending that the evidence against them had been obtained as the result of illegal arrest. R. 213.

The principal evidence against petitioners was documentary. In regard to petitioner Lam,[2] there was: (1) an immigration document showing his arrival on April 14, 1967 at Tacoma, Washington, as a crewman, of Chinese nationality, on the M.V. World Yuri, and his grant of shore leave, conditioned on departure with his vessel, but in no event for longer than 29 days (R. 267); (2) an affidavit executed by him on October 31, 1967 in which he admitted his alienage, his arrival as a crewman at Portland, Oregon, and his desertion from the vessel after which he went to Washington, D. C., where he was employed at Trader Vic's Restaurant as a dishwasher (R. 265-266); (3) a seaman's identity book and a seaman's discharge book, issued to him in Hong Kong, with endorsements showing their use, and including photographs, found by the special inquiry officer to be a good likeness of this petitioner (R. 152-160, 78-79, 91-93).

In regard to petitioner Yim, the evidence included: (1) a crewman's landing permit showing his arrival at Los Angeles, California on June 21, 1967 as an alien crewman, of Chinese nationality, on the M.V. Oriental Musician, and his grant of shore leave, conditioned on his departure with the next sailing of the vessel, but in no event for longer than 29 days (R. 263); (2) an affidavit executed by him on October 31, 1967, in which he admitted his alienage, his arrival with the vessel as a

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[2] In accordance with the Chinese custom, the family name of the petitioners usually is listed as the first of their three designated names. This practice was followed in the administrative proceedings. However, in these review proceedings petitioners have listed their family names last.

crewman and his unauthorized departure from it at Baltimore, Maryland on July 7, 1967, and his employment thereafter as a dishwasher at Trader Vic's Restaurant in Washington, D. C. (R. 261); (3) a seaman's identity book and a seaman's discharge book, together with an international certificate of vaccination, issued to him in Hong Kong, containing endorsements showing their use, and including photographs, found by the special inquiry officer to be good likenesses of this petitioner (R. 132-140, 68-70, 74-75).

In regard to petitioner Au, the evidence included: (1) immigration documents showing refusal of shore leave on several occasions over a period of years at various ports of the United States. R. 253-257; (2) an affidavit executed by him on October 31, 1967 admitting alienage, his arrival with the vessel as a crewman on the M.V. Shih Hong at New Orleans, Louisiana on June 20, 1967 and his refusal of admission to the United States at that time, his desertion from the vessel at Newark, N.J., on July 12, 1967, and his employment as a dishwasher at Trader Vic's Restaurant (R. 259); (3) a seaman's identity book and a seaman's discharge book issued to him in Hong Kong, containing endorsements showing their use, and including photographs, found by the special inquiry officer to be good likenesses of this petitioner (R. 141-151, 73-74).

The incidents underlying the claim of illegal arrest, and alleged improper reception of evidence, were fully developed in the administrative record. On October 31, 1967 information was received by immigration officers at the Washington, D. C. field office, indictaing that illegal aliens were employed at the Trader Vic Restaurant, located in the Statler Hotel. R. 225, 114-115. A group of at least seven immigration investigators (R. 81), then walked over to the Trader Vic Restaurant, located only a couple of blocks from their office (R. 125), arriving there about 5:30 P.M. Their purpose was to ascertain if any employees of the restaurant were aliens illegally in the United States. R. 228, 67. They had no warrant of

arrest, since the information concerning alleged illegal entrants was not definite enough. R. 226. Investigator Podrasky, who was in charge of the group, had the name of only one alleged illegal entrant, who was never located and was not one of the petitioners herein. R. 114-115. Immigration officers had been at the same restaurant two or three times in the preceding year for the same purpose. R. 112-113.

The Trader Vic Restaurant is a large establishment, with many means of ingress and egress. R. 123. Upon their arrival at the restaurant several of the officers were stationed at some of the various exits. R. 81, 124. Their purpose was described by one of them as follows, (R. 124):

> A. If anyone had tried to leave hurriedly from that exit, I would have identified myself and talked to them before they left.
>
> Q. Anyone, or just people. . .
>
> A. Well, I would say anyone who would appear to me to be an alien. I would ascertain if they were an alien and to the best of my ability at that time.

This officer also testified that a number of people came out of the exit who were permitted to pass, apparently without any specific inquiry. R. 124-125.

Three of the officers (Podrasky, Burns and Taylor), entered the restaurant through its front entrance, and spoke to the assistant manager, who was then in charge. They identified themselves, told him the purpose of their visit, and asked his permission to talk to the employees, to which he agreed. R. 229, 195, 66, 67. There was some conflict as to the scope of the assistant manager's agreement. The officers testified that he had given them permission to go into the kitchen to interrogate employees working there, and himself led the officers into the kitchen. R. 111, 114. The assistant manager testified that he had merely offered the officers a table in the restaurant at which they could question the employees, although he admitted that he did not tell the officers specifically that

they could not go into the kitchen. R. 201-203. However, the special inquiry officer found that the officers had received permission to enter the kitchen (R. 39), and the Board of Immigration Appeals accepted this factual determination (R. 9).

While still in the main dining room, the officers observed a person of Chinese extraction (later identified as petitioner Yim), dressed in a blue denim uniform, "proceeding at a rapid pace through the main dining room". Since this person appeared to be leaving the premises, officer Burns followed him to the door, identified himself as an immigration officer, and asked this person to "accompany me to the kitchen where we could discuss this further. He did." R. 230, 67-68. Officer Burns followed petitioner Yim into the kitchen, and petitioner proceeded through the kitchen to the locker room, where he started to change clothes. R. 231, 71. In the locker room this petitioner was asked whether he had any immigration documents, and whether he "jumpy ship". Petitioner said, "Yes, me jumpy ship". R. 232.

While officer Burns was still in the main dining room with petitioner Yim, a second employee (later identified as petitioner Lam), who was also dressed in work clothes, joined them and was asked to "accompany me [the officer] back to the kitchen where we could talk further". R. 71. He did so, and while proceeding through a portion of the dining room, started to run, and encountered officer Lamoreaux who asked him whether he was off a ship, to which he gave an affirmative answer. R. 78, 86. Petitioner Lam then rejoined officer Burns and went with him to the locker room to change clothes. R. 72, 79.

Officer Taylor was questioning persons in the kitchen area, when he noticed two Chinese employees running out of the kitchen into a hallway. He followed them and caught up with one of them, later identified as petitioner Au. Petitioner Au stopped, and when the officer questioned him through another employee, admitted he had come off a ship, and agreed to accompany the officer to

the locker room, where they joined the others. R. 46-47, 53-60.

All three petitioners then accompanied the officers to the immigration office, where they awaited the arrival of an interpreter. After the arrival of the interpreter sworn statements were taken from each of the three petitioners in which they admitted that they had come as crewmen and were illegally in the United States. R. 232, 72-73, 90. Before their affidavits were taken, each of the petitioners was fully warned about his right to be silent and to be represented by counsel, and each of petitioners stated that he did not want a lawyer. R. 90-91, 127. The affidavits, including the detailed warnings to each petitioner as to their rights, appear at R. 259, 261, 265.

At the conclusion of the consolidated administrative hearing, the special inquiry officer on November 21, 1967 found the respondents deportable. R. 185. Upon appeal, the Board of Immigration Appeals on April 30, 1968 remanded the case for clarification of the record. R. 162. At the conclusion of the reopened hearing the special inquiry officer, on January 13, 1969, again ordered that respondents be deported. R. 36. The deportation order was affirmed by the Board of Immigration Appeals on June 20, 1969, in a comprehensive opinion analyzing and rejecting petitioners' claim that evidence produced by an illegal arrest had been relied on. R. 3-13. All three petitioners then joined in this petition for review challenging the order for their deportation.

RELEVANT STATUTORY PROVISIONS

Section 287 of the Immigration and Nationality Act, 8 U.S.C. 1357, provides in part:

> Sec. 287. (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a), provides in part:

The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended, (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.)[3] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior act, except that—

* * * *

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by rea-

[3] By section 4(e) of the Act of Sept. 6, 1966, P. L. 89-554, 80 Stat. 378, 621, the 1950 Act referred to in this statute was recodified as 28 U.S.C., Title 158, Secs. 2341-2352.

> sonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), provides for the deportation of any alien who—

> entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

ARGUMENT

In this review proceeding petitioners do not deny that they are aliens or that they are deportable. Nor do they dispute the solidity of the evidence in the hearing record. At the administrative hearing they remained mute. And in this court the sole issue they raise concerns the admissibility of the evidence on which the deportation order is predicated.

The issue before the court is thus a narrow one. It concerns the contention that petitioners were subjected to illegal arrest, and that the evidence presented at the hearing was the tainted fruit of such arrest. We submit that the record supports neither of these two theories on which the claim of petitioners rests.

I. The Preliminary Inquiries by Immigration Officers at the Trader Vic Restaurant Were Authorized by Law and Did Not Constitute Arrest.

Basic to petitioners' claim is the hypothesis that an arrest took place when immigration officers stopped them at the restaurant and sought to question them. Br. 10. We believe this hypothesis is untenable. The events described in the record covered several hours, and traversed different stages. There is no doubt that petitioners eventually were arrested. But in our view it is wrong to

suppose that a person stopped by officers for questioning has been arrested.

Terry v. *Ohio*, 392 U.S. 1, 13 (1968) underscores the unsoundness of generalizations regarding inquiries by officers seeking to ascertain whether a law violation has occurred, since such encounters "are incredibly rich in diversity". Every inquiry by a police officer doubtless involves some measure of restraint. But *Terry* demonstrates the fallacy of designating all such encounters as arrests, or of outlawing such preliminary inquiries unless the officer has probable cause for an arrest. *Terry* specifically endorsed an officer's authority to "stop", and sometimes even to "frisk", a person whom he sought to interrogate. The criterion in such situations is not whether there is probable cause for an arrest, but rather whether, in the light of all the circumstances, the officers' actions were reasonable. Under the direct holding of *Terry*, reasonable preliminary inquiries, including some degree of restraint short of arrest, satisfy the mandate of the Fourth Amendment, which inhibits only "unreasonable searches and seizures".

In order to assess the actions of the officers in the instant case, it is important to view them in their complete setting. When they left their office on the afternoon of October 31, 1967 the officers had no warrant of arrest, and no basis for obtaining one. The information regarding illegal aliens employed at Trader Vic Restaurant was indefinite and in any event did not relate ot petitioners. In going to the restaurant their purpose was not to arrest petitioners, who were unknown to them, but rather to inquire whether any aliens illegally in the United States were employed there.

Upon arrival at the restaurant some of the officers were stationed at various exits. Their purpose, obviously based on past experience in such cases, was to intercept for further inquiry any persons who might appear to be fleeing when the immigration officers appeared in the restaurant. As this court ruled in *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F.2d 683

(1969), cert. den. 396 U.S. 877, this procedure did not constitute an arrest of any person in the restaurant. As a matter of fact some employees left without hindrance, when their departure was not under suspicious circumstances. R. 124-125.

When three of the officers entered the restaurant, their sole purpose was to question the employees. As petitioners concede (Br. 23), the officers had the same right as the general public to enter the restaurant. After entering the restaurant they admittedly sought and obtained the manager's permission to question the employees. There was some dispute whether this included permission to enter the kitchen. However, Board of Immigration Appeals found that such permission was granted. R. 9. That factual determination, supported by substantial evidence, is conclusive in this review proceeding, under the explicit mandate of Sec. 106(a)(4) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(4). In any event, as the Board points out (R. 9), this conflict is irrelevant, since none of the incidents complained of occurred in the kitchen; two of the petitioners were approached in the restaurant and the third in a public hallway of the hotel.

The next incident in this developing pattern of events occurred while the officers were questioning employees in the main dining room. Officer Burns observed petitioner Yim, who was dressed in a work uniform, "proceeding at a rapid pace through the main dining room", apparently trying to leave the premises. Officer Burns followed him, caught up with him at the front door, identified himself as an immigration officer and asked petitioner Yim, who spoke broken English, "would he accompany me back to the kitchen where we would discuss this further. He did." R. 230, see also R. 67-68. Petitioner Yim, followed by Officer Burns, then went through the kitchen to the locker room, where he started to change clothes. He then admitted that he had jumped ship. R. 232.

While Officer Burns and Mr. Yim were in the main dining room, petitioner Lam, similarly dressed in work-

ing clothes, also was seen proceeding through the main dining room toward the front door. Officer Burns asked him to "accompany me back to the kitchen area where we could talk further." R. 68, 71. He complied, but while still in the dining room started to run and he was followed by Officer Lamoreaux "and he stopped running when he reached the locker room", where he started to change clothes. R. 71. When stopped by Officer Lamoreaux petitioner Lam admitted he was off a ship. R. 78-86. In the locker room Mr. Yim also admitted that he had jumped ship. R. 72.

Officer Taylor was questioning persons in the kitchen area, when he noticed two Chinese employees running out of the kitchen into a hallway. He followed, and caught up with one of them, petitioner Au, in a public hallway. He asked him to come back to the kitchen, and petitioner Au complied. Through another employee, who spoke to him in Chinese, petitioner Au then admitted that he had come off a ship. He then agreed to accompany the officer to the locker room, where they joined the others. R. 46-47, 53-60.

All three aliens then went with the officers to the nearby immigration office, where their statements were taken. R. 72-73, 79-80, 92, 94-108, 117-119, 121-122, 126-130. Formal deportation proceedings were then commenced. R. 252, 260, 264.

It seems to us that petitioners are clearly wrong in their assumption that an arrest, requiring a showing of probable cause, occurred when the officers sought to question them. The process of preliminary inquiry and interrogation in which the officers were engaged is a necessary aspect of all law enforcement. The situation of immigration officers is a somewhat special one, since they must cope with an immense problem presented by hundreds of thousands of aliens who seek to enter the United States illegally. During fiscal year 1968, for example, over 200,000 deportable aliens were found in the United States. 1968 Annual Report, Immigration and Naturalization Service, p. 11. Of these, 4,129 were

deserting crewmen, like petitioners herein. Id., p. 13. The cited report shows that the number of such illegal entrants is constantly increasing.

It could hardly be anticipated that this vast army of illegal entrants would come forward and confess their unlawful status. And the likelihood is remote that adequate proof identifying illegal entrants could be assembled through independent sources. Therefore, effective enforcement of the immigration laws manifestly requires that immigration officers ascertain the places where illegal entrants are likely to be found, and at such places to attempt to examine the credentials of persons believed to be aliens, concerning their right to be in the United States. Congress recognized the need for such inquiries and supplied specific authorization in Sec 287(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(1), which empowers immigration officers

> to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

Many such interrogations take place in the fields where agricultural workers are employed, (see *Taylor* v. *Fine*, 115 F.Supp. 68 (S.D. Cal., 1953)); others occur on the highways near the borders of the United States (see *Fernandez* v. *U.S.*, 321 F.2d 283 (C.A. 9, 1963); *Ramirez* v. *U.S.*, 263 F.2d 385 (C.A. 5, 1959)); still others occur in restaurants, factories, or establishments where illegal entrants are known to seek employment (see *Yam Sang Kwai* v. *INS*, 411 F.2d 683 (C.A.D.C. 1969), cert. den. 396 U.S. 877; *U.S.* v. *Montez-Hernandez*, 291 F. Supp. 712 (E.D. Cal. 1959)). In each instance, as we have indicated, the interrogation involves some measure of restraint. It is unrealistic to suggest, as petitioners do, that this preliminary inquiry cannot proceed unless it is supported by probable cause. Moreover, the adoption of such a suggestion would have a devastating effect on effective enforcement of the immigration laws.

The inquiry here was orderly and reasonable. There was no display of force or disruption of business. The officers informed the assistant manager of their mission and obtained his consent to question the employees. When petitioners were encountered under suspicious circumstances they were asked to accompany the officers to a place where further inquiry could be conducted, and they agreed to do so. It is true that they were stopped for such questioning, but we have shown that such a "stop" is not an arrest. It is analogous to a police officer's questioning of a person who is acting suspiciously, as in *Terry* v. *Ohio*, or such an officer's license check of a motorist.

It is clear that immigration officers have authority to enter a public place, like a restaurant, to conduct interrogations there. *Amaya* v. *United States*, 247 F.2d 947 (C.A. 9, 1957), cert. den. 355 U.S. 916. As this court has held in a comparable situation, such an interrogation by police officers is not an arrest. *Green* v. *United States*, 259 F.2d 180, 181 (C.A.D.C. 1958), cert. den. 359 U.S. 917. Moreover, it was proper for immigration officers to conduct such interrogations in the Trader Vic Restaurant on the basis of their general experience that illegal aliens often are found employed in such establishments, and the more specific information they had received. See *United States* v. *Montez-Hernandez*, 291 F.Supp. 712 (E.D. Cal. 1959); *Taylor* v. *Fine*, 115 F.Supp. 68 (S.D. Cal. 1953).

We reject the effort of petitioners to place prejudicial racial overtones on the conduct of the officers. There is no support whatever for the suggestion that petitioners were interrogated because of any discriminatory attitude towards Chinese. As we have noted, the officers were merely pursuing lines of investigation suggested by their experience, indicating that deserting Chinese crewmen often are employed in restaurants serving Chinese food, and by the specific information that some such illegal entrants might be employed at the Trader Vic Restaurant. They doubtless would press similar inquiries for

Italian aliens in Italian restaurants and for Greek aliens in Greek restaurants. Moreover, like inquiries in the Southwest often focus on farms, vineyards, and places of business employing Mexican aliens, in order to ascertain whether there are illegal entrants among such employees. The fact that in different areas the inquiries concentrate on persons of particular racial or national derivation is attributable solely to the experience of enforcement officers indicating that illegal entrants of this character may be located in such areas.

We do not believe the resolution of the issues posed by petitioners is advanced by their generalized quotations attempting to define arrest. The patterns of police inquiry, as noted in *Terry* v. *Ohio*, are infinitely diverse. Preliminary interrogation, including some restraint, is permitted. The point at which such preliminary restraint develops into an arrest will depend on the particular circumstances of each case, rather than on abstract definitions.

Nor do we find that the authorities cited by petitioners support their thesis. *Coleman* v. *United States*, 295 F.2d 555 (C.A.D.C. 1961), cert. den. 369 U.S. 813, involved a murder charge for a killing during a robbery. The defendant contended that the robbery process had been ended by an arrest, so that the subsequent killing did not occur during that process. This court merely held that the trial court's generalized instruction, read in proper context, had sufficiently left the issue to the jury. *Kelley* v. *United States*, 298 F.2d 310 (C.A.D.C. 1961) merely found that arrest had taken place, in the circumstances of the particular case, where the police directed the suspect to come outside the restaurant and immediately ordered him to disclose the contents of his clothing. In *Henry* v. *United States*, 361 U.S. 98, 103 (1959), the government conceded that an arrest had taken place, and this concession was confirmed by the court, "for purposes of this case".

Moreover, any comfort petitioners might seek from the foregoing authorities is entirely dispelled, we believe, by

the subsequent expressions of the Supreme Court. Thus, in the much-discussed *Miranda* decision, 384 U.S. 436, 477 (1966) the court observed:

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.

Even more pertinent, as we have indicated, is *Terry* v. *Ohio*, 392 U.S. 1 (1968). In upholding a police officer's authority to "stop and frisk" a suspect, in appropriate circumstances, the court endorsed restraints incidental to preliminary inquiry which go beyond any limited restraints shown in this record. The Court's opinion repeatedly recognized the need and propriety for such limited restraints, short of arrest. E.g. 392 U.S. at 16, 19 (Note 16), 22. See also concurring opinion of Justice White, 392 U.S. at 34.[4] The validity of such limited restraints incidental to interrogation depends, as we have indicated, on their reasonableness, rather than on the probable cause required to support an arrest.

We invite attention also to the Supreme Court's latest expression in *Morales* v. *New York*, 396 U.S. 102 (1969).

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[4] Petitioners' quotation from Justice White's concurring opinion (Br. 16) is incomplete. The following is a more complete quotation, which casts Justice White's views in a somewhat different direction than that suggested by petitioners:

> Also, although the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. In my view, it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons.

There a person suspected of murder was detained briefly for questioning, at a time when the police had no probable cause to arrest him. He soon confessed commission of the crime, and in the subsequent trial challenged the admissibility of the confession on the ground that it was obtained after an illegal arrest. In support of the conviction, the State argued that it was entitled to conduct brief custodial investigation of suspected persons. The court remanded for fuller development of the record in regard to the circumstances of the alleged arrest. The court declared that in the absence of a fuller record, "we choose not to grapple with the question of the legality of custodial questioning on less than probable cause for a full-fledged arrest". 38 L.W. 4024.

In *Morales* the defendant was apprehended by police officers at his mother's place of business and taken to the police station for questioning. Yet the Supreme Court declined, in the absence of amplified information, to find that an arrest had occurred. The police restraint depicted in *Morales* manifestly is far more severe than that in the instant case, which involved merely stopping the petitioners for questioning at their place of employment. Under the concepts expounded in *Terry* v. *Ohio*, the actions of the immigration officers in stopping and questioning the petitioners in the instant case were manifestly reasonable and lawful. Therefore petitioners' attempt to characterize their actions as illegal arrest should be rejected.

II. Petitioners Were Legally Arrested.

It could plausibly be urged, we believe, that petitioners were not actually arrested until after they executed their formal statements in the immigration office. See *Morales* v. *New York*, supra. However, it is unnecessary to go that far. In our view, the arrest here is valid even if it occurred at either one of the other two critical moments portrayed in the record: (1) when petitioners were stopped by the immigration officers and asked to go to the kitchen for further questioning; or (2) when they

admitted in the locker room that they had jumped ship and were asked to accompany the officers to the immigration office for further questioning.

Any such arrest would depend on the authority conferred by Section 287(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(2), which empowers an immigration officer, without warrant,

> to arrest any alien in the United States if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

The statute thus requires the joinder of two elements to justify an arrest without warrant: (1) reason to believe that the arrested alien is in the United States illegally; and (2) reason to believe that the arrested alien is likely to escape before an arrest warrant can be obtained. The "reason to believe" mentioned in the immigration statute perhaps can be substantially equated with the "probable cause" traditionally underlying criminal arrests.

The second of the two elements can be disposed of quickly. We hardly think petitioners can persuasively urge (see Br. 21) that there was ample time to obtain an arrest warrant. There was utterly no ground for obtaining a warrant before petitioners were encountered in the restaurant, and only a foolhardy officer would have left these unidentified, rootless, and apparently illegal aliens in the restaurant in order to obtain a warrant, with any rational expectation of finding them still there when he returned to serve it.

The only issue in this connection thus is whether the arresting officer had reason to believe that the petitioners were aliens unlawfully in the United States. We consider first the point at which petitioners contend an ar-

rest took place, when they were stopped by the officers and asked to accompany them to the kitchen for further questioning. As our earlier discussion indicates, we believe this was a stop for interrogation and not an arrest. But even if it were deemed an arrest, we believe it was amply supported by "reason to believe" (or "probable cause", if that is deemed a more exacting standard) that petitioners were aliens unlawfully in the United States. In appraising such "reasonable" or "probable" cause it is necessary to view the situation confronting the officers in totality, rather than to isolate single elements, as petitioners do, and to challenge each as inadequate. The factors supporting the arrests included the following:

(a.) *The information that illegal aliens were employed at Trader Vic Restaurant.* Obviously such information was not in itself sufficient to justify an arrest, but it was part of the entire picture. The cases cited by petitioners hold that an indefinite and unsubstantiated informant's tip, standing alone, is insufficient justification for an arrest or a search. We agree. But these cases cannot be cited as authority for ignoring the tip, as a basis for interrogation, or as part of a chain of events adding up to "reasonable" or "probable" cause for arrest.

(b.) *The experience of the officers, in connection with Trader Vic and other restaurants serving Chinese food, that illegal entrants might be found employed there.* We have already refuted the hypothesis that it was somehow discriminatory to interrogate persons because they appeared to be of Chinese extraction. In the present context, such interrogation, as we have shown, is motivated solely by the knowledge that many Chinese crewmen have deserted their ships and by the officers' experience that such illegal aliens often find employment in restaurants serving Chinese food. Petitioners' reliance on *Rios* v. *United States*, 364 U.S. 253 (1960) is misplaced. The court there did not find that an improper arrest had taken place, but remanded the case for further evidence, in the light of the contention "that the po-

licemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission". 364 U.S. at 262. Nor do we believe *Sibron* v. *United States*, 392 U.S. 40 (1968) is relevant, except in the determination of whether a stop and frisk was reasonable in the environment of that case.

(c.) *The attempted flight of petitioners when the officers appeared at the restaurant.* It seems universally agreed that attempted flight of a suspect may be an important element in a finding of probable cause for detention or arrest. Each of petitioners attempted to flee when he learned that immigration officers were questioning employees at the restaurant. In the context of this case, when it appeared that the fleeing persons were dressed in work clothes and had little or no knowledge of the English language, there was obviously reasonable basis for believing they were aliens unlawfully in the United States. In a comparable situation, where immigration officers were attempting to interrogate a Chinese person in a restaurant he claimed to own, Judge McGowan of this court made the following observations, *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F.2d 683, 688 (C.A.D.C. 1969) cert. den. 396 U.S. 877:

> If appellant here had, in response to the first request for information about his status, said that he would respond as soon as he completed some chore in the kitchen, and then had run out of the back door with every appearance of a man permanently retiring from the restaurant business, it seems clear that the questioning investigator, if fleet enough to catch up with him, would have had either a reasonable suspicion adequate to detain him for further questioning or perhaps even probable cause to arrest for being in the country illegally.

Another holding of this court which emphasizes that attempted flight is an important element of probable

cause is *Green* v. *U.S.*, 259 F.2d 180, 182 (C.A.D.C. 1958), cert. den. 359 U.S. 917

On the entire picture, it seems clear that the immigration officers had probable cause for an arrest at this juncture of the inquiry. Moreover, there was even stronger cause for such an arrest in the locker room, when petitioners were asked to accompany the officers to the immigration office. By this time each of the petitioners had admitted that he had jumped ship. With such admissions, and the added factors noted above, the probable cause had become a virtual certainty.

We cannot agree that the officers had created "a chaotic and confusing situation which precipitates ambiguous conduct on the part of an ostensibly law-abiding person", as petitioners assert. Br. 15-16. The situation here was hardly "choatic and confusing". The officers behaved throughout with courtesy and consideration. They conducted their interrogation in a quiet and reasonable manner, without any force or intimidation. The employees interrogated, including petitioners, were asked to cooperate in the inquiry, which they did.

Moreover, the attempt to characterize the conduct of petitioners as ambiguous hardly accords with the facts. On the contrary, kitchen employees who attempt to flee in their work clothes upon learning that they are to be questioned by immigration officers have, as we have indicated, provided strong support for a belief that they are seeking to escape detection.

We submit that if petitioners were actually arrested at the Trader Vic Restaurant, such arrests were amply supported by reasonable or probable cause.

III. The Deportation Order Is Supported by Clear, Unequivocal, and Convincing Evidence Untainted by Any Illegal Search and Seizure.

Even if there had been an illegal search and seizure at the restaurant, which we deny, petitioners cannot prevail unless they establish that the evidence underlying the deportation order resulted from this impropriety. The

Supreme Court has ruled that irregularities in the arrest or in other preliminary proceedings do not affect the validity of a deportation order, if it is supported by untainted evidence. *Bilokumsky* v. *Tod*, 263 U.S. 149 (1923). In *Vlissidis* v. *Anadell*, 262 F.2d 398, 400 (C.A. 7, 1959), the court observed:

> Evidence obtained as the result of an unlawful arrest may be suppressed, but we know of no authority for holding a deportation proceeding such as we are here considering to thus become null and void.

And in *Klissas* v. *INS*, 361 F.2d 529 (C.A.D.C. 1966) this court specifically held, in the face of a challenge comparable to that in the instant case, that the deportation order was adequately supported by untainted evidence. See also *Medeiros* v. *Brownell*, 240 F.2d 634 (C.A. D.C. 1957); *Coelho* v. *Brownell*, 240 F.2d 635 (C.A.D.C. 1957); 2 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.) § 8.12b, p. 8-84.

The deportation order here rests entirely on evidence and inferences not attributable to any alleged unlawful search and seizure. As we have indicated (p. 2, supra), the underlying evidence is primarily documentary. We find no basis in the record for supposing that any of this evidence was the fruit of improper action of the officers at the restaurant.

Petitioners constantly refer to a warrantless and unlawful search at the restaurant. But the record provides no justification for supposing that a search of any kind took place. As we have indicated, the officers came only to interrogate employees, and they requested and obtained permission to do so. They did not search any part of the premises. Nor was there any search of the persons of petitioners. The record shows only that they were asked to produce identification, much as a motorist is asked to show his license. We believe that in their fervent assault upon "warrantless search", petitioners are doing battle with straw men.

A major item in the evidence against petitioners consisted of the immigration documents showing their arrival as crewmen. R. 267, 263, 253-257. These are official documents, unrelated to any arrest or search, which show that petitioners arrived as alien crewmen and are unlawfully in the United States. Section 291 of the Immigration and Nationality Act, 8 U.S.C. 1361 places on the respondent in a deportation case the burden of showing the time, place, and manner of his entry into the United States. By remaining mute, petitioners failed to sustain that burden. Section 291 continues:

> If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

The immigration documents, coupled with the statutory presumption of deportability evoked by petitioners' silence, may in themselves provide adequate support for the deportation order.

The seamen's identification books introduced into the record were likewise untainted evidence. There can be no objection on this score to the special inquiry officer's finding, based on visual examination at the hearing, that the photographs on these documents related to petitioners. See R. 152-160, 78-79, 91-93, 132-140, 68-70, 74-75, 141-151, 73-74. And, as we have indicated, there is no evidence in the record that these documents were discovered by search or that their production by petitioners was coerced. Indeed, the record is unclear as to the manner in which these documents were obtained, except to show that they were presented by respondents. Officer Lamoreaux testified that in the locker room at the Trader Vic he asked respondent Lim for identification and looked at some papers Mr. Lim presented, although he could not recall the nature of such papers (R. 89-90); and that petitioner Yim must have presented the seaman's identification book referred to in his statement, although he could not recall exactly how or when the book came into the picture (R. 91-92). Since this is all there is in the record, it can reasonably be assumed, in the absence of

any countervailing evidence, that petitioner Yim presented his identification book voluntarily in response to a request for identification. We find no evidence in the record relating to the production of the books by the other petitioners, and in the absence of any showing of impropriety, we believe it reasonable to assume that they too presented the books voluntarily, in response to a request for identification at some stage of the proceedings.

There remain for consideration the affidavits admitting deportability executed by petitioners at the immigration office. If these statements had resulted solely from an illegal arrest they would concededly be inadmissible. But the record shows that the affidavits were voluntarily given, in a setting free of intimidation or oppression. While in the immigration office awaiting the arrival of the interpreter, the petitioners were visited and advised by friends, and enjoyed considerable freedom of action and movement (R. 235-236). Moreover, before the statements were taken, each of the petitioners was given a complete warning, complying in every respect with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436, (1966), of their right to remain silent and to be represented by counsel.[5] The verbatim language of the warnings given to petitioners is set forth in the statements they executed. See R. 265, 261, 259. Yet after being seasonably apprised of their right to remain silent and to be represented by counsel, petitioners voluntarily elected to give the statements. In these circumstances, in our view, the effect of any irregularity in the arrest became so attenuated with respect to the statements that the rule of exclusion as "fruit of the poisonous tree" would not apply.

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[5] Although the courts thus far have found the *Miranda* rule inapplicable to immigration proceedings, respondent has voluntarily adopted the standards of *Miranda*, and gives the full warning required by that decision before interrogating persons under official restraint as well as those executing formal statements of the type involved here. See 1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.) § 5.2b (1969 Cum. Supp.).

We submit, therefore, that petitioners cannot support their contention that the deportation order relied on tainted evidence.

CONCLUSION

For the reasons set forth above, the deportation orders should be affirmed and the petition for review should be dismissed.

Respectfully submitted,

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